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REVIEW OF FURTHER DEVELOPMENTS IN THE FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

Written statement submitted by the American Association of Jurists, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following communication, which is distributed in accordance with Economic and Social Council resolution 1296 (XLIV).

[5 July 1994]

Impunity in respect of violations of economic, social and cultural rights and the right to development

1. For some years now the American Association of Jurists has been asserting that the study of immunity should also cover violations of economic, social and cultural rights and of the right to development. In other words, violations of these rights should be sanctioned in the same way as violations of civil and political rights. This idea, which initially met with a great deal of scepticism and reticence, seems to be gaining ground. Evidence of this is to be found in operative paragraph 3 of resolution 1993/37 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which recommends that the special rapporteurs on the question of impunity examine the subject.

2. The first objective to be pursued is the preparation of a draft General Assembly resolution declaring all policies and practices of States, public and private institutions and individuals which constitute obstacles to the achievement of the right to development and/or violations of economic, social and cultural rights, and the abusive exercise of economic power to secure disproportionate concessions, advantages or benefits to the serious detriment of third parties, to be international delicts (crimes).

3. In the document "Criminalization of violations of the right to development and economic, social and cultural rights", distributed at the World Conference on Human Rights with the reference number A/CONF.157/PC/63/Add.8, the AAJ began to develop this theme, which requires examination in greater depth.

4. There is a wealth of international standards on the subject of economic, social and cultural rights and the right to development laying obligations on States, on the one hand, to take specific action - in other words, to establish policies directed at ensuring the enjoyment of economic, social and cultural rights and at promoting the right to development - and, on the other, to refrain from certain courses of action, both in a manner consistent with respect of the right to self-determination, that of sovereign control over natural resources, etc. However, the instruments enshrining those rights are powerless in the face of decisions of transnational economic powers, the governing elites of the major industrial powers and the subordinate elites of many other countries, which flagrantly and systematically violate those rights with impunity, with the most serious consequences for a considerable part of humankind. With a few exceptions, no provision is made for the sanctioning of conduct of this kind, which has hitherto enjoyed complete immunity. It has been rightly said that a law which does not provide for sanctions where it is violated is a toothless law. Cherif Bassiouni[1/] writes that there are five successive stages in the development of human rights - (a) enunciatory (the emergence of certain internationally perceived common values); (b) declaratory (the proclamation in an international instrument or document of certain human interests or rights identified as such); (c) prescriptive (the formulation of those rights in international instruments or binding agreements); (d) implementative (the search for or development of forms of implementation); and finally, the stage of criminalization (the development of international penal provisions). The AAJ considers that the time has come, in the context of violations of economic, social and cultural rights and the right to development, to move forward to the criminalization stage, since the machinery for the protection of those rights established so far has proved inadequate.

5. Thus the task before us is one of defining or categorizing as international crimes a series of types of conduct which violate economic, social and cultural rights and the right to development. To this end it is necessary to consider the following: (a) the types of legal "assets" to be protected; (b) who the perpetrators of the crimes may be; (c) who the victims may be; (d) what are the methods used; (e) the fraudulent or illegal forms, etc. A few preliminary remarks follow on these subjects; they will require exploration in greater depth at a later stage.

6. The determination of the legal "assets" to be protected arises from the systematic interpretation of the international legal order. Operative paragraph 1(d) of General Assembly resolution 32/130 states that "human rights questions should be examined globally, taking into account both the overall context of the various societies in which they present themselves, as well as

the need for the promotion of the full dignity of the human person and the development and well-being of the society." It can thus be said that the common denominator of the legal "assets" protected is the full dignity of the human person and the development of the well-being of society. These "assets" include certain fundamental human rights, such as the right to life, to health, to sufficient food, to education, to housing, etc. Although the realization of economic, social and cultural rights is by its very nature progressive, the satisfaction of basic needs in relation to foodstuffs, health, education and housing entails obligations immediately applicable, at least to the extent of the resources available[2/]. Thus the legal "assets" protected by penal means would be the basic needs which must be met in order to ensure the dignity of the human person and to permit the development and the progressive well-being of society. There are, too, other rights of an economic and social nature laid down in the International Covenant on Economic, Social and Cultural Rights and other international instruments (equality of rights for men and women, equal pay, the right to organize and to strike, the rights of children and juveniles, the right to primary education, etc.), which constitute obligations of immediate applicability, and violations of which should be made subject to appeal (Committee on Economic, Social and Cultural Rights, General Comment No. 3, referred to in footnote 2).

7. The subject of the perpetrators of violations of this kind was raised during discussions within the Committee on Economic, Social and Cultural Rights, which was attended by one of the special rapporteurs on impunity (E/C.12/1993/SR.47, 14 December 1993). The AAJ considers that any entities or individuals bound by international law to respect and implement human rights - i.e., (a) States; (b) national and international institutions governed by public law; (c) national and international institutions governed by private law; and (d) individuals - may be perpetrators of the crime of violation of economic, social and cultural rights.

8. The responsibility of States is one of the cornerstones of public international law. The principle is enshrined in articles 18 and 26 (and other articles of similar import) of the Vienna Convention on the Law of Treaties, article 2 of the Proclamation of Teheran and other international instruments, and also in United Nations practice on the basis of resolution 8 (XXIII) of the Commission on Human Rights and resolution 1503 (XLVIII) of the Economic and Social Council. In addition, the International Law Commission has made considerable progress with its draft instrument on the responsibility of States; article 5 of its draft Code of Crimes against the Peace and Security of Mankind, adopted on first reading in 1991, provides that "Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it"[3/].

9. National and international institutions governed by public law are also liable. In particular, attention should be directed to the International Monetary Fund and the World Bank - both formally specialized agencies within the United Nations system - on account of the preponderant role they exercise in economic and financial policy at world level. The status of the two institutions imposes on them not only the obligations of their respective constituent documents but also those of Articles 55, 56, 57, 58, 63 and 64 of the United Nations Charter. The International Court of Justice has stated that the rights and duties of entities such as the United Nations and its specialized agencies must depend on their purposes and functions as specified or implied in their constituent documents and developed in practice[4/]. The

criminal liability of legal persons is a long-established principle in the national legislation of many countries and in international law, as is that of the personal liability of the legal representatives of such entities. (See, inter alia, the recommendations of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990, the 1983 International Convention for the Prevention of Pollution from Ships, and resolution No. 77/28 of the Committee of Ministers of the Council of Europe on the contribution of criminal law to the protection of the environment, all quoted in document A/CONF.157/PC/63/Add.8, paragraphs 17, 46 and 47).

10. As regards the personal liability of the representatives of the Bretton Woods organizations, which formed the subject of comments during the discussion in the Committee on Economic, Social and Cultural Rights mentioned earlier (E/C.12/1993/SR.47), the AAJ agrees that the basic responsibility lies with the countries which, both de facto and de jure (through weighted voting), hold the decision-making power; but from the legal standpoint it is necessary to refer back to the statutes of the institutions concerned. Section 3 of Article 12 of the Articles of Agreement of the International Monetary Fund states that "The Executive Board shall be responsible for conducting the business of the Fund, and for this purpose shall exercise all the powers delegated to it by the Board of Governors." Section 4 of the same article states that: "The Managing Director and the staff of the Fund, in the discharge of their functions, shall owe their duty entirely to the Fund and to no other authority. Each member of the Fund shall respect the international character of this duty and shall refrain from all attempts to influence any of the staff in the discharge of these functions."

The subject is a difficult one, particularly as it relates to the establishment of liability on the part of the major transnational powers. However, as Jeschek has said, the awareness of the limited effect of criminal policy by comparison with the total potential of the social forces which generate criminality does not absolve science from studying means of improving the situation as regards criminality[5/].

Conclusions

11. For reasons of space this document has discussed in a highly condensed fashion a few aspects of the subject. The points made will be developed further, as will other aspects, of which only mention has been made in paragraph 5. Above all, however, the AAJ wishes at this time to emphasize that the study of impunity in connection with violations of economic, social and cultural rights should certainly cover cases already covered by criminal law, such as corruption of national and foreign officials and illicit gains by public officials, but should not be confined to these. It should also seek to make progress towards the incorporation within the field of criminal law of the large-scale and systematic violations of these rights, whether perpetrated by States, by national or international institutions governed by public or private law or by individuals.

1/ Cherif Bassiouni, "International Crimes, Introduction" in International Criminal Law (Cherif Bassiouni, ed.), Transnational Publishers, New York, Vol. I, pp. 16-17.

2/ Committee on Economic, Social and Cultural Rights, Report on the Fifth Session, General Comment No. 3 ((E/C.12/1990/8).

3/ International Law Commission, forty-fifth session, 1993 (A/CN.4/448).

4/ "Reparation for injuries suffered in the service of the United Nations", advisory opinion of the International Court of Justice, in International Court of Justice, Reports of judgments, advisory opinions and orders, year 1949, p. 180.

5/ Hans Heinrich Jeschek, "La crisis de la política criminal", in Doctrina Penal, Buenos Aires, 1980, p. 151.